

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

February 8, 2006 Session

STATE OF TENNESSEE, DHS, ET AL. v. WILLIAM (BILLY) THOMASON

Appeal from the Juvenile Court for Anderson County
No. J-13207 Patricia R. Hess, Judge

No. E2005-00327-COA-R3-JV - FILED MARCH 27, 2006

The State of Tennessee, DHS,¹ filed a petition for civil contempt against William (Billy) Thomason (“Father”), alleging that he failed to pay support for his minor children, Billy H. Phillips (DOB: January 14, 1992) and Dakota J. Phillips (DOB: May 10, 1994). At a hearing in 2004, the trial court found Father in civil contempt and sentenced him to 20 days in jail. The sentence was “suspended” so long as Father continued to pay the court-ordered support. The trial court specified in that earlier order that Father could purge himself of the contempt by paying support of \$661. At a subsequent hearing in February, 2005, the trial court entered a new judgment of civil contempt; it sentenced Father to a total of 30 days in jail, which sentence included the previously-suspended sentence of 20 days. The court ordered that Father could purge himself of this most recent finding of contempt by paying a total of \$916 in support, which amount included the previous purge amount of \$661. Father appeals, arguing that the trial court erred in its new finding of contempt and in imposing the previously-suspended sentence. We affirm in part and reverse in part.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court
Affirmed in Part; Reversed in Part; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Billy P. Sams, Oak Ridge, Tennessee, for the appellant, William (Billy) Thomason.

Paul G. Summers, Attorney General and Reporter, and Warren Jasper, Assistant Attorney General, for the appellee, State of Tennessee, DHS, ex rel. Angela M. Phillips.

OPINION

¹DHS is the abbreviation for the Department of Human Services.

I.

On July 15, 1994, the trial court ordered Father to pay child support of \$160 per month, which amount represented prospective child support of \$150 and \$10 per month to be applied toward Father's child support arrearage. Almost four years later, the State, on behalf of the mother of Billy H. Phillips, filed a petition for civil contempt against Father, alleging that he had failed to pay child support as ordered in 1994 and that he was in arrears \$10,370 as of November 30, 1997. The trial court entered a default judgment against Father on November 27, 2000, *nunc pro tunc* to the date of the hearing on the petition, March 2, 2000, finding that Father had been properly served but had failed to appear for the hearing. The court issued an order of attachment on that same date.

On March 6, 2001, the trial court ordered Father to submit to a paternity test on April 6, 2001, in order to establish the parentage of both Billy H. Phillips and Dakota J. Phillips. The trial court conducted a hearing on July 5, 2001; Father again failed to appear. The court granted the State's motion for summary judgment on the issue of paternity based upon the test results and declared Dakota J. Phillips to be Father's legal child.² Child support was increased to \$235 per month. In addition, the court found an arrearage of \$24,130 as of June 30, 2001, to be paid at the rate of \$100 per month. The order reflected that the attachment was to remain in full force and effect.

Father was appointed counsel on February 17, 2004. A hearing was held on July 20, 2004, at which time the court determined that there had not been a significant variance warranting a change in support. It ordered that child support remain at \$235 per month. As of June, 2004, Father's arrearage was set at \$31,240.98, to be paid at a rate of \$20 per month. The court sentenced Father to 20 days in jail, all of which was "suspended" provided Father continued to pay child support as ordered by the court. The court held that Father could purge himself of contempt by a payment of \$661.

The hearing that led to the judgment now on appeal was held on February 1, 2005. Father was the only witness. He testified that he was 37 years of age; that he never completed high school; and that he did not have a GED. Beginning in July, 2004, Father worked for Briarcliff Healthcare Center in Oak Ridge, where he was making \$8.85 an hour. While working for Briarcliff, Father moved from Oak Ridge to LaFollette to live with his girlfriend. Father claimed that he lost his job with Briarcliff in October, 2004, because his girlfriend's car broke down and he was unable to get to work. Father failed to call Briarcliff to advise it of his transportation problem. After three days of failing to show up for work and failing to call, Father was subject to termination and was, in fact, terminated. Father testified that his girlfriend did not have a telephone and that "[n]obody in LaFollette will let you make a long distance phone call." Father's reason for moving further away from his job, and from reliable transportation, was somewhat unclear, but it appeared to have had something to do with his sister and a former girlfriend "causing problems." Father paid no child

²While the order does not mention the parentage of Billy H. Phillips, it is clear that the test results established Father as the legal parent of him as well.

support in the month of December, 2004. In January, 2005, Father got a job working for Lake City Healthcare Center, making \$7.80 an hour.

At the conclusion of the hearing, the trial court made the following findings:

[T]he question is whether or not there's willful contempt, and there is.

I mean, you moved to a place where it was more difficult for you to get to work, and are now saying that you lost your job because of it. But that was a – that was a choice on your part.

There doesn't appear to be a reason not to impose the prior order, which was 20 days in jail, \$661 purge. Additionally, there's at least one additional month [of failure to pay child support, subjecting Father to] ten days [in jail], and a \$250 purge on items that have happened since then.

So, basically, I'm enforcing the prior order and then bringing it up to date.

The trial court entered an order on February 2, 2005, reflecting these findings. From this order, Father appeals.

II.

Our review of this non-jury case is *de novo*; however, the record comes to us accompanied by a presumption of correctness as to the trial court's factual findings, a presumption we must honor unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d). No presumption of correctness attaches to the lower court's conclusions of law. ***Jahn v. Jahn***, 932 S.W.2d 939, 941 (Tenn. Ct. App. 1996).

III.

A.

Father raises two issues on appeal: (1) whether the trial court erred in finding him in contempt; and (2) whether the trial court erred when it enforced a previously-suspended sentence. We affirm the trial court's finding of contempt and related 10-day sentence, but reverse the court's attempted belated enforcement of the 20-day "suspended" sentence.

B.

In a civil contempt action, a party's failure or refusal to comply with a court order results in the imposition of punishment for the benefit of the opposing party. *Shiflet v. State*, 400 S.W.2d 542, 543 (Tenn. 1966). Such punishment is remedial in nature, "compelling the doing of something by the contemnor, which, when done, will work his [or her] discharge." *Id.* The contemnor bears the burden of proving an inability to pay support as ordered. *See Leonard v. Leonard*, 341 S.W.2d 740, 743 (Tenn. 1960).

In the instant case, Father had the burden of convincing the trial court of his lack of culpability in failing to pay support. When questioned as to why he failed to make a child support payment in December, 2004, Father replied that "[t]here was no work and I tried." Father claimed that he was "willing to do just about anything to prove to [the] Court that [he is] going to pay child support." His actions, however, belie his stated intention. Father formerly lived in Oak Ridge where he had a job earning \$8.85 an hour. He moved from Oak Ridge to LaFollette, resulting in unreliable transportation. This unreliable transportation, coupled with his apparent inability to find a telephone on which to make a phone call from LaFollette to Oak Ridge, cost him his job. Almost two months later, he found another job, making less money. The trial court found that Father lost his job because he made the *choice* to move; that the move was not made out of necessity. In moving, Father had to know that getting to work after the move was potentially more difficult than before. He made this move, nonetheless, and this choice resulted in the loss of his job, his income, and his ability to pay support. We cannot say that the evidence preponderates against the trial court's finding of the necessary factual predicate to support a holding of civil contempt.

C.

With respect to the issue of the suspended sentence, Father argues – and the State concedes – that the trial court committed error when it imposed the previously-suspended 20-day jail sentence. This court has held that "[t]here is no such thing as a suspended sentence for civil contempt." *Mayer v. Mayer*, 532 S.W.2d 54, 60 (Tenn. Ct. App. 1975). We reverse that portion of the trial court's judgment attempting to reinstate the "suspended" 20-day sentence and the related \$661 purge amount. The trial court's sentence of 10 days in jail for the most recent finding of contempt, to be purged upon payment of \$255, is affirmed.

IV.

The judgment of the trial court is affirmed in part and reversed in part. This case is remanded to the trial court for such further proceedings, if any, as may be necessary, consistent with this opinion. Costs on appeal are taxed to the appellant, William (Billy) Thomason.

CHARLES D. SUSANO, JR., JUDGE